

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals
for the Second Circuit, held at the Daniel Patrick Moynihan
United States Courthouse, 500 Pearl Street, in the City of
New York, on the 31st day of October, two thousand seven.

PRESENT:

HON. JON O. NEWMAN,
HON. SONIA SOTOMAYOR,
HON. DEBRA ANN LIVINGSTON,
Circuit Judges.

DE GUAN YU,
Petitioner,

v.

PETER D. KEISLER, ACTING
UNITED STATES ATTORNEY GENERAL,¹
BOARD OF IMMIGRATION APPEALS,
Respondents.

07-1213-ag
NAC

¹ Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Acting Attorney General Peter D. Keisler is automatically substituted for former Attorney General Alberto R. Gonzales as a respondent in this case.

1 **FOR PETITIONER:** Henry Zhang, Zhang and Associates,
2 P.C., New York, New York.

3
4 **FOR RESPONDENTS:** Peter D. Keisler, Acting Attorney
5 General and former Assistant
6 Attorney General, Civil Division;
7 Lisa Arnold, Senior Litigation
8 Counsel; Robbin K. Blaya, Trial
9 Attorney, Office of Immigration
10 Litigation, U.S. Department of
11 Justice, Washington, D.C.

12
13 UPON DUE CONSIDERATION of this petition for review of a
14 decision of the Board of Immigration Appeals ("BIA"), it is
15 hereby ORDERED, ADJUDGED, AND DECREED that the petition for
16 review is DENIED in part and DISMISSED in part.

17 De Guan Yu, a citizen of the People's Republic of
18 China, seeks review of a March 6, 2007 order of the BIA
19 affirming the October 14, 2005 decision of Immigration Judge
20 ("IJ") Michael W. Straus, denying his applications for
21 asylum, withholding of removal, and relief under the
22 Convention Against Torture ("CAT"). *In re De Guan Yu*, No.
23 A77 317 132 (B.I.A. Mar. 6, 2007), *aff'g* No. A77 317 132
24 (Immig. Ct. Hartford Oct. 14, 2005). We assume the parties'
25 familiarity with the underlying facts and procedural history
26 of this case.

27 When the BIA issues an opinion that fully adopts the
28 IJ's decision, this Court reviews the IJ's decision. See,
29 *e.g.*, *Chun Gao v. Gonzales*, 424 F.3d 122, 124 (2d Cir.

1 2005); *Secaida-Rosales v. INS*, 331 F.3d 297, 305 (2d Cir.
2 2003). We review the agency's factual findings, including
3 adverse credibility determinations, under the substantial
4 evidence standard. 8 U.S.C. § 1252(b)(4)(B); see *Zhou Yun*
5 *Zhang v. INS*, 386 F.3d 66, 73 & n.7 (2d Cir. 2004),
6 *overruled in part on other grounds by Shi Liang Lin v. U.S.*
7 *Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007) (*en banc*).
8 Questions of law are reviewed *de novo*. See *Secaida-Rosales*,
9 331 F.3d at 307.

10 The IJ based his adverse credibility finding primarily
11 on inconsistencies that arose between Yu's account of family
12 planning policy enforcement in Fujian Province and
13 corresponding State Department materials. Yu testified that
14 all violators of the policy are automatically subject to
15 forced abortions, without having the opportunity to pay a
16 fine instead. The IJ found that this squarely contradicted
17 the State Department reports that China's family planning
18 policy in Yu's former residence of Fujian Province is
19 generally enforced through pressure and fines, and only the
20 sporadic use of forceful means. The IJ further noted Yu's
21 wife's certificate of abortion, which Yu contended proved
22 the forced procedure, but which the State Department
23 materials indicate is only issued by hospitals at the

1 patient's request following a voluntary abortion. See *Tu*
2 *Lin v. Gonzales*, 446 F.3d 395, 400 (2d Cir. 2006) ("[T]he
3 [State Department] profile in this case constituted a basis
4 for the IJ to have found implausible [petitioner's]
5 testimony that his wife's abortion - as evidenced by the
6 certificate - was involuntary.").

7 The IJ also placed some reliance on substantial
8 discrepancies between Yu's seaport interview with an
9 Immigration Officer, on the one hand, and his asylum
10 materials and testimony, on the other. See *Ramsameachire v.*
11 *Ashcroft*, 357 F.3d 169, 179-82 (2d Cir. 2004) (noting that
12 such inconsistencies may be relied upon where the record of
13 a port interview indicates that it presents an accurate
14 account of the interviewee's statements and was not
15 conducted under coercive or misleading circumstances). In
16 Yu's written asylum materials and in his testimony before
17 the IJ, Yu stated that he left China on account of his
18 wife's forced abortion and his opposition to China's family
19 planning policy. The IJ found that this directly
20 contradicted Yu's June 1, 2004 seaport interview statements
21 that he fled China and feared repatriation because he "had a
22 lot of debt."

23 Because the IJ's adverse credibility determination was

1 based primarily on inconsistencies between Yu's and the
2 State Department's descriptions of China's family planning
3 policy, the IJ's analysis raises the question whether the IJ
4 "excessively relied" on State Department materials and thus
5 reached a determination unsupported by substantial evidence.
6 See *Tian-Yong Chen v. INS*, 359 F.3d 121, 130 (2d Cir. 2004)
7 ("[T]he immigration court should be careful not to place
8 excessive reliance on published reports of the Department of
9 State."); cf. *Xiao Ji Chen v. U.S. Dep't of Justice*, 471
10 F.3d 315, 341-42 (2d Cir. 2006) (reliance on State
11 Department materials proper where not treated as binding or
12 excessively relied upon); *Tu Lin*, 446 F.3d at 400 (finding
13 State Department materials probative and proper basis for
14 finding specific testimony implausible) (citing *Guan Shan*
15 *Liao v. Dep't of Justice*, 293 F.3d 61, 71 (2d Cir. 2002)).

16 We need not decide this question in the circumstances
17 of this case, however, because we can confidently predict
18 that, even assuming the IJ's analysis was flawed in some
19 respects, remand would be futile as the agency would reach
20 the same decision to deny Yu relief absent any errors that
21 were made. See *Xiao Ji Chen*, 471 at 338-39 (2d Cir. 2006).
22 We recently determined, sitting *en banc*, "that [IIRIRA §
23 601(a)] does not provide that a spouse-and *a fortiori*, a

1 boyfriend or fiancé-of someone who has been forced to
2 undergo, or is threatened with, an abortion or sterilization
3 is automatically eligible for 'refugee' status." See *Shi*
4 *Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 309 (2d
5 Cir. 2007) (*en banc*). Rather, we found, the statutory
6 scheme "unambiguously dictates that applicants can become
7 candidates for asylum relief only based on persecution that
8 they themselves have suffered or must suffer." *Id.* at 308.
9 Here, Yu based his application for asylum entirely on his
10 wife's alleged forced abortion. He did not allege that he
11 suffered persecution or feared persecution based on his own
12 resistance to the family planning policy. See 8 U.S.C. §
13 1101(a)(42). Yu is therefore ineligible for the relief he
14 sought.²

15 Finally, because Yu did not challenge the IJ's denial
16 of CAT relief in his brief to the BIA, we lack jurisdiction
17 to review his challenge to that determination and dismiss
18 the petition for review to that extent. 8 U.S.C. §
19 1252(d)(1).

² Judge Sotomayor continues to disagree with the majority opinion in *Shi Liang Lin* to the extent it applies beyond unmarried partners, see *Shi Liang Lin*, 494 F.3d at 327 (Sotomayor, J., concurring), but she is bound by court precedent, see *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004).

1 For the foregoing reasons, the petition for review is
2 DENIED in part and DISMISSED in part. As we have completed
3 our review, Yu's pending motion for a stay of removal in
4 this petition is DISMISSED as moot.

5 FOR THE COURT:
6 Catherine O'Hagan Wolfe, Clerk
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8 By: _____